(4)

NO. 08-652

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

JEFFREY A. BEARD, Secretary, Pennsylvania Department of Corrections, *et al.*,

Petitioners,

v.

MUMIA ABU-JAMAL,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

Should this Court grant certiorari to review the constitutionality of jury instructions where those instructions have not been given in the last twenty years, where the District Court and Court of Appeals expressly identified and applied the correct rules of constitutional law in evaluating those instructions, where the District Court and Court of Appeals expressly identified and applied the correct rules of deference to the state courts under 28 U.S.C. § 2254(d) in determining that habeas relief is appropriate, and, where the issues for which the Commonwealth seeks review are unlikely to arise in many other cases?

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For the reasons stated herein, this Court should deny the Petition for Writ of Certiorari.[1]

STATEMENT OF THE CASE

A. State Court: Respondent, Mumia Abu-Jamal, was convicted of murder and sentenced to death in Philadelphia, Pennsylvania. The Pennsylvania Supreme Court affirmed on direct appeal, *Commonwealth v. Abu-Jamal*, 555 A.2d 846 (Pa. 1989) ("*Abu-Jamal-1*"), and denied state post-conviction relief, *Commonwealth v. Abu-Jamal*, 720 A.2d 79 (Pa. 1998) ("*Abu-Jamal-2*"). In the state post-conviction proceedings, Mr. Abu-Jamal exhausted a claim that the capital sentencing verdict form and oral instructions violated *Mills v. Maryland*, 486 U.S. 367 (1988), because they required the jury to unanimously find a mitigating circumstance before giving it effect in the sentencing decision.

B. Federal District Court: On federal habeas review, the District Court carefully considered the *Mills* claim, addressed it at length, found it meritorious, and granted relief from the death sentence. *See Abu-Jamal v. Horn*, 2001 WL 1609690 (E.D. Pa. Dec. 18, 2001) ("*Abu-Jamal-3*"), partially reproduced at App. 126-69. The District Court rejected Mr. Abu-Jamal's challenges to his conviction.

The District Court carefully discussed this Court's *Mills*-related precedent, including *Mills*, *McKoy v. North Carolina*, 494 U.S. 433 (1990), and *Boyde v. California*, 494 U.S. 370 (1990), as well as prior Third Circuit rulings on *Mills* claims. The District Court recognized that, under this Court's precedent and under Third Circuit precedent, the standard for evaluating whether jury instructions violate *Mills* is that described in *Boyde* – "whether there is a reasonable likelihood that the jury [as opposed to a reasonable individual juror] has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Abu-Jamal-3*, App. 128 (quoting *Boyde*, bracketed material in original). The District Court further explained:

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1. The Petition for Writ of Certiorari is referenced herein as "*Petition*." The Appendix to the *Petition* is cited as "App." Petitioners are referred to as "the Commonwealth." Transcripts in Pennsylvania are referred to as "Notes of Testimony" and cited herein as "NT." All emphasis is supplied unless otherwise indicated. Parallel citations are usually omitted.

> While the Third Circuit repeatedly has noted the applicability of the *Boyde* standard in assessing *Mills* claims, *see Banks v. Horn*, 271 F.3d 527, 2001 WL 1349369, at *16 (3d Cir. Oct.31, 2001) and *Frey v. Fulcomer* 132 F.3d 916, 921 (3d Cir.1997), the court of appeals also has at least mentioned an alternate, arguably less stringent standard for determining whether *Mills* has been violated. *See, e.g., Banks*, 271 F.3d 527, 2001 WL 1349369, at *13 ("Proper application of *Mills* requires at the outset that the reviewing court examine the entire jury instructions, posing the "critical question" whether a reasonable jury *could have concluded*... that unanimity was required to find a mitigating circumstance.") (emphasis added); *Frey*, 132 F.3d at 923 ("[W]e must determine whether it is reasonably likely that the jury *could have understood* the charge to require unanimity in consideration of mitigating evidence.") (emphasis added). There is no dispute, however – and indeed, both *Frey* and *Banks* make this point explicitly – that the standard to be applied to *Mills* claims is that articulated in *Boyde*. Accordingly, I am concerned in evaluating petitioner's *Mills* claim with whether there is "a *reasonable likelihood* that the jury *has* applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380 (emphasis added).

Abu-Jamal-3, App. 128 n.80.

Because the Pennsylvania Supreme Court denied the *Mills* claim on the merits, the District Court carefully applied the deferential standards of AEDPA's 28 U.S.C. § 2254(d) to the state court decision. The District Court first observed that, under AEDPA:

> A petitioner seeking a writ based on a claim that was both exhausted and adjudicated on the merits in the state courts may have his application granted only if the state court decision: (1) was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States"; (2) "involved an unreasonable application of" such established federal law; or (3) was the result of "an unreasonable determination of the facts in light of the evidence presented" in state court. § 2254(d). To clarify the circumstances in which the writ may be granted, it is necessary to review the parameters of these statutory phrases.

Abu-Jamal-3, 2001 WL 1609690 at *10 (footnote omitted).[2]

The District Court then described the interpretation given § 2254(d) by this Court in *Williams v. Taylor*, 529 U.S. 362 (2000) ("*Terry Williams*"):

> In *Terry Williams*, the Court explained that a state court decision falls within the prohibition of the "contrary to" clause if it is "substantially different from the relevant precedent" of the Supreme Court, or if it "applies a rule that contradicts the

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2. This part of *Abu-Jamal-3* is not included in the Commonwealth's Appendix.

governing law set forth" in Supreme Court opinions. *Terry Williams*, 529 U.S. at 405. "A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Id.* at 406. In other words, "[u]nder the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Id.* at 412-13.

> [T]he Supreme Court . . . also addressed the proper standard of review under the "unreasonable application" clause. *See Terry Williams*, 529 U.S. at 407-13. The Court explained that "when a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case, a federal court applying § 2254(d)(1) may conclude that the state-court decision falls within the provision's "unreasonable application" clause." *Id.* at 409. The Court then cautioned federal habeas courts against insufficiently deferential review of state court decisions. "[A] federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* Moreover, "the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* at 410 (emphasis in original). In short, "[u]nder the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principles from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. It is important to recognize that AEDPA requires of federal habeas courts greater deference to state court applications of law to fact than did prior law. *See id.* at 403-04 (discussing the AEDPA's restriction of independent federal review).

Abu-Jamal-3, 2001 WL 1609690 at *10-*11; *see also id.* at *107 ("Again, I stress that in *Terry Williams*, the Supreme Court explained that in making the unreasonable application inquiry, a federal habeas court should ask whether the state court's application of clearly established federal law was objectively unreasonable, which is different from an incorrect application of federal law. *See Terry Williams*, 529 U.S. at 409-10. . . . [T]he AEDPA standard requires federal habeas courts to give greater deference to state court applications of law to fact than did prior law.").

When the District Court specifically addressed the *Mills* claim, it again emphasized that it was applying the deferential standards of § 2254(d):

> The Pennsylvania Supreme Court identified the correct federal law as determined by the Supreme Court of the United States, *i.e.*, the *Mills* decision. As such, the state supreme court did not "apply a rule that contradicts the governing law set

forth" by the Supreme Court. *See Terry Williams*, 529 U.S. at 405. The issue, then, is whether there was an unreasonable application of *Mills*. . . .

Indeed, it is important to reiterate here that the standards under which [Mr. Abu-Jamal's] *Mills* claim must be evaluated are those set forth in the AEDPA. This is to be contrasted with the Third Circuit's analysis in *Frey*, which employed pre-AEDPA standards in determining whether a violation of *Mills* had been effected in that case. Therefore, habeas relief will not be warranted pursuant to *Mills* if it is merely the case that, had I evaluated [Mr. Abu-Jamal's] *Mills* claim *ab initio*, I would have found it to be meritorious. . . . Put differently, a significant degree of deference is due the state supreme court's application of federal law. Instead, if [Mr. Abu-Jamal] is to be granted a writ of habeas corpus pursuant to this claim, it must necessarily be the case that the Pennsylvania Supreme Court's determination *Mills* had not been transgressed was "contrary to," or "involved an unreasonable application of" the United States Supreme Court's decision in that case. *See* 28 U.S.C. 2254(d)(1); *Terry Williams*, 529 U.S. at 405.

However, given, that the propriety of habeas relief based on this claim turns on the application of law (*i.e.*, *Mills*) to facts, and that the facts of this case are materially distinguishable from those at issue in *Mills*—for example, the language employed by the verdict form and by the trial court in instructing the jury in [Mr. Abu-Jamal's] case diverges from that at issue in *Mills*—the "contrary to" standard for relief is inapplicable here. *See Terry Williams*, 529 U.S. at 406 ("[A] run-of-the-mill state-court decision applying the correct legal rule from our cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s "contrary to" clause."). Accordingly, the court will inquire whether the Pennsylvania Supreme Court, in denying [Mr. Abu-Jamal's] *Mills* claim, applied unreasonably that holding.

Abu-Jamal-3, App. 132-33 & n.82.

The District Court carefully applied the federal constitutional standards of *Mills* and *Boyde*, and found that the instructions given here violated the Eighth Amendment. The District Court carefully applied the deferential standards of § 2254(d) to the state court decision on the *Mills* claim, and found that it was an "unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States." Accordingly, the District Court vacated the death sentence. *Abu-Jamal-3*, App. 169.

C. **Third Circuit**: The Third Circuit unanimously affirmed the District Court's grant of sentencing relief on the *Mills* claim. *See Abu-Jamal v. Horn*, 520 F.3d 272 (3d Cir. 2008) ("*Abu-Jamal-4*"), App. 15-17, 66-83, 85 n.31. The Third Circuit found that the District Court had "thoroughly explored" the *Mills* claim in the District Court's lengthy and comprehensive opinion, *Abu-*

Jamal-4, App. 15; the Third Circuit then gave its own thorough analysis of the claim.

The Third Circuit, like the District Court, recognized that the proper standard for reviewing a *Mills* challenge to jury instructions is set forth in *Boyde*, and, like the District Court, it applied *Boyde* here:

> In *Mills*, the Court posed "[t]he critical question . . . whether petitioner's interpretation of the sentencing process is one a reasonable jury could have drawn from the instructions given by the trial judge and from the verdict form employed in this case." *Id.* at 375-76. In *Boyde v. California* 494 U.S. 370 (1990), the Supreme Court clarified the legal standard as "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380.

Abu-Jamal-4, App. 74-75; *see also id.*, App. 6 ("whether the jury charge and sentencing verdict sheet violated Abu-Jamal's constitutional rights under *Mills* . . . and *Boyde*"); *id*, App. 73 ("We must determine whether the Pennsylvania Supreme Court decision was unreasonable in light of *Mills* and *Boyde*"); *id.*, App. 66, 79-80 (noting that District Court properly applied *Mills* and *Boyde*); *id.*, App. 83 ("We conclude the Pennsylvania Supreme Court's decision was objectively unreasonable under the dictates of *Mills* and *Boyde*.").

The Third Circuit, like the District Court, also recognized and applied the deferential standards of § 2254(d):

> Under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), a state prisoner's habeas petition must be denied as to any claim that was "adjudicated on the merits in State court proceedings" unless the adjudication "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) & (2). Under the "unreasonable application" prong of § 2254(d)(1), "the question . . . is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." *Schriro v. Landrigan*, ___ U.S. ___, 127 S.Ct. 1933, 1939 (2007) (citing *Williams[]*, 529 U.S. [at] 410).

Abu-Jamal-4, App. 17;

> Our standard on collateral review is whether the state's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly es-

> tablished Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). AEDPA creates "an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings," and we are guided by the statute's "binding [] directions to accord deference."

Abu-Jamal-4, App. 55 (quoting and citing *Uttecht v. Brown*, 127 S.Ct. 2218, 2224 (2007); *Landrigan*, 127 S.Ct. at 1939; *Williams*, 529 U.S. at 413); *see also Abu-Jamal-4*, App. 51 (describing "AEDPA's deferential standard of review"); *id.*, App. 53 n.21 (noting the "deferential standards provided by AEDPA § 2254(d)"); *id.*, App. 72-73 ("Our review is limited to whether the Pennsylvania Supreme Court unreasonably applied *Mills*. *See* 28 U.S.C. § 2254(d)(1); *Williams*, 529 U.S. at 405. . . . We must determine whether the Pennsylvania Supreme Court decision was unreasonable in light of *Mills* and *Boyde*.").

The Third Circuit carefully applied the federal constitutional standards of *Mills* and *Boyde*, and the deferential standards of § 2254(d), and concluded:

> We conclude the Pennsylvania Supreme Court's decision was objectively unreasonable under the dictates of *Mills* and *Boyde*. The jury instructions and the verdict form created a reasonable likelihood that the jury believed it was precluded from finding a mitigating circumstance that had not been unanimously agreed upon. Accordingly, we will affirm the District Court's grant of relief on this claim.

Abu-Jamal-4, App. 83.

The Commonwealth did not seek rehearing. The Commonwealth seeks this Court's review.[3]

SUMMARY OF REASONS FOR DENYING THE WRIT

This case was tried before *Mills v. Maryland* was decided, at a time when Pennsylvania's courts did not require a particular verdict form or jury instructions at capital sentencing. In response to *Mills*, the Pennsylvania Supreme Court issued new rules prohibiting use of the verdict form and instructions used herein and requiring new *Mills*-compliant forms and instructions. Thus, the verdict form and instructions used in this case have not been used in the last twenty years.

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3. The District Court and Third Circuit found the *Mills* claim is not procedurally barred and *Teague v. Lane*, 489 U.S. 288 (1989), is irrelevant because Mr. Abu-Jamal's conviction became final after *Mills* was decided. App. 67-71, 134-35. The Commonwealth does not challenge these rulings.

Mr. Abu-Jamal challenged the instructions given in his case under *Mills*. The Pennsylvania Supreme Court denied the *Mills* claim on the merits. On federal habeas review, the District Court and the Third Circuit expressly identified and applied the correct rules of constitutional law in evaluating the instructions, and found the instructions unconstitutional. The District Court and Third Circuit also expressly identified and applied the correct rules of deference to the state courts under AEDPA's 28 U.S.C. § 2254(d), and found that the state court's decision was an unreasonable application of clearly established Supreme Court law, warranting relief from the death sentence.

The Commonwealth request for certiorari should be denied. Certiorari review is not appropriate when, as here, "the asserted error consists of . . . the misapplication of a properly stated rule of law." Supreme Court Rule 10. Moreover, certiorari is also inappropriate because the issues for which the Commonwealth seeks review are not of "general importance." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). As stated above, the verdict form and instructions at issue here have not been used for twenty years, because the Pennsylvania Supreme Court barred them in response to *Mills*. Nor are the issues presented by the Commonwealth likely to arise in many other cases, because *Mills* does not apply retroactively and, thus, older cases that may involve forms and instructions similar to those used herein are unlikely to receive merits review. The Commonwealth's request for certiorari review of well-reasoned rulings by the District Court and the Third Circuit, on issues that are unlikely to arise in many other cases, should be denied.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE DISTRICT COURT AND UNANIMOUS THIRD CIRCUIT DID NOT ERR

A. The District Court and Third Circuit Did Not Err When They Unanimously Found That the Sentencing Verdict Form and Oral Instructions Violated *Mills*

Jury instructions that require the jury to unanimously find a mitigating circumstance violate the Eighth Amendment because they create a "barrier to the sentencer's consideration of all mitigating evidence." *Mills*, 486 U.S. at 375. Instructions violate *Mills* when, "viewed in the context of the overall charge," there is a "reasonable likelihood" that the jury interpreted the instructions as requir-

ing a unanimous mitigation finding. *Boyde*, 494 U.S. at 378, 380. The District Court and unanimous Third Circuit correctly found that the sentencing verdict form and oral instructions violated *Mills*.

1. **The form**: A single, the three-page verdict form was given to the jury. The form, as completed by the jury, states:

> We, the jury, having heretofore determined that the above-named defendant is guilty of murder of the first degree, do hereby further find that:
>
> (1) We, the jury, unanimously sentence the defendant to
> ☒ death
> ☐ life imprisonment.
>
> (2) (To be used only if the aforesaid sentence is death)
> We, the jury, have found unanimously
> ☐ at least one aggravating circumstance and no mitigating circumstance. The aggravating circumstance(s) is/are _____ _____.
> ☒ one or more aggravating circumstances which outweigh any mitigating circumstances. The aggravating circumstance(s) is/are __A_____.
> The mitigating circumstance(s) is/are _____A_____.
>
> - - -

This verdict form *plainly requires* the jury to find each mitigating circumstance *unanimously*, for several reasons. *See Abu-Jamal-3*, App. 148-52, 165-68; *Abu-Jamal-4*, App. 75-76, 80-81.

(a) The form opens with "*We, the jury*, having heretofore determined that the above-named defendant is guilty of murder of the first degree, *do hereby further find that*:" The form thus requires that *everything* marked on it must be *found by the jury that found Mr. Abu-Jamal guilty – i.e.*, the *unanimous jury*.

Page One of the form requires the jury to specify the sentence; requires the jury to specify that "[t]he aggravating circumstance(s) is/are _____"; and requires the jury to specify that "[t]he *mitigating circumstance(s)* is/are _____." Given the form's opening statement, that everything on the form must be *unanimously* found, the form thus requires that the sentence, the aggravating circumstances and the *mitigating* circumstances must be unanimously found. While the first two requirements are proper, the third violates *Mills*.

Pages Two and Three of the form list ten aggravating circumstances and eight mitigating circumstances with a "( )" next to each to be checked if it is found. Given the form's opening statement, which tells the jury to mark only items that it unanimously finds, the form thus specifies that the jury is to find an aggravating or *mitigating* circumstance only if it is *unanimously* found. While the first requirement is proper, the second violates *Mills*.

(b) The form has an additional express unanimity requirement on Page One:

> We, the jury, have found *unanimously*
> ☒ one or more aggravating circumstances which outweigh any mitigating circumstances. The aggravating circumstance(s) is/are A.
> *The mitigating circumstance(s) is/are* A.

Thus, the form requires the jury to consider only the aggravating and *mitigating* circumstances that it has "found *unanimously*." While the first requirement is proper, the second violates *Mills*.

(c) Page Three of the form, just below the list of mitigating circumstances, requires the signatures of *all twelve jurors*. Again, this ensures that only *unanimously* found mitigat-

ing circumstances are considered. If fewer than twelve jurors found a mitigating circumstance, checked it on the checklist on Page Three (despite the fact that the form opens with a requirement that only findings of the *unanimous jury* be recorded), and wrote it on Page One (despite the fact that Page One says "We the jury have found *unanimously* . . . [t]he mitigating circumstance(s) is/are _____"), then the jurors that disagreed *could not sign the verdict form without violating their oaths*. The presence of all twelve signatures confirms that the jury considered only the mitigating circumstance that it unanimously found.

(**d**) Unanimity for finding a mitigating circumstance is also required by the form's everywhere *identical treatment* of aggravating and mitigating circumstances. To comply with *Mills*, the jury would have to *ignore* this and assume, *contrary to the form's plain language* and *without any rational basis*, that aggravation and mitigation should be treated *differently*. A court cannot assume that the jury treated aggravating and mitigating circumstances differently. Instead, the court must "presume that, unless instructed to the contrary, the jury would read similar language throughout the form consistently." *Mills*, 486 U.S. at 378. Thus, the identical treatment of aggravating and mitigating circumstances confirms that *both* must be unanimously found.

(**e**) The specific findings recorded on the form by the jury further highlight the *Mills* violation.

Trial counsel argued for several mitigating circumstances, under 42 Pa.C.S. § 9711(e): Mr. Abu-Jamal had no prior convictions and, thus, had "no significant history of prior criminal convictions," (e)(1); Mr. Abu-Jamal was "under the influence of extreme mental or emotional disturbance," (e)(2), as a result of seeing the decedent beating Mr. Abu-Jamal's brother; Mr. Abu-Jamal's age (27 years) at the time of the offense, (e)(4); and "other evidence of mitigation concerning the character and record of the defendant," (e)(8), based upon testimony from fifteen defense witnesses, *see* NT 6/30/82 at 17-50, 125-56; NT 7/1/82 at 3-31, regarding Mr. Abu-Jamal's good character and history of concern for and assistance to Philadelphia's African-American community. *See* NT 7/3/82 at 38-

The (e)(1) mitigating circumstance ("no significant history of prior criminal convictions") was *not disputed* by the Commonwealth and was present as a matter of law because Mr. Abu-Jamal had no prior convictions. However, the Commonwealth vigorously disputed the *other* mitigating circumstances – (e)(2), (e)(4) and (e)(8) – that were argued by counsel.

The jury's mitigation findings were *exactly* what one would expect, given the *Mills* violation. The jury *unanimously found* the (e)(1) mitigating circumstance, as it *had to*. But the jury did *not* unanimously find the other, *disputed*, mitigating circumstances. The jury's specific findings thus confirm that there is a reasonable likelihood that the jury understood the verdict form and instructions in a way that violated *Mills*.

(f) Further confirmation that the *Abu-Jamal* form violated *Mills* is found in the similarity between the *Abu-Jamal* form and the form used in *Mills*, 486 U.S. at 384-89, which contained a similar checklist of mitigating circumstances. If anything, the *Abu-Jamal* form was even *more likely* to be understood as requiring a unanimous mitigation finding than was the *Mills* form.

The *Mills* form gave the jury the choice of marking "yes" or "no" for each listed mitigating circumstance, and the list was prefaced with: "[W]e unanimously find that each of the following mitigating circumstances which is marked 'yes' has been proven to exist by a preponderance of the evidence and each mitigating circumstance marked 'no' has not been proven by a preponderance of the evidence." *Id.*, 486 U.S. at 387 (capitalization altered).

Maryland's high court interpreted the jury's "no" entries on the form as showing that the jury *unanimously rejected* the "no"-marked mitigating circumstance. *See id.*, 486 U.S. at 372. So-interpreted, the death sentence was *constitutional* – if the jury *unanimously rejected* each mitigating circumstance, no juror was prevented from giving effect to mitigation that s/he believed to exist.

This Court found the Maryland court's interpretation of the *Mills* form "plausible" in light of the form's language ("we unanimously find that . . . each mitigating circumstance marked 'no' has

not been proven by a preponderance of the evidence"). *Id.*, 486 U.S. at 377. The death sentence was nevertheless unconstitutional because it was not clear that the *jury* gave the form the same interpretation as did the Maryland court. *See id.* at 375-76.

The *Abu-Jamal* form is not even susceptible to the "plausible" saving-interpretation that the Maryland court gave the *Mills* form. In *Mills*, the jury marked each mitigating circumstance "yes" or "no," and a "no" mark was plausibly interpreted as a *unanimous rejection* of the mitigating circumstance. Here, the jury's options were to check a mitigating circumstance if it was found, or *leave it blank*, and the failure to check cannot plausibly be interpreted as a unanimous rejection. Instead, it signifies the jury's failure to *unanimously find* a mitigating circumstance. Thus, the Mills violation is even more clear in *Abu-Jamal* than in *Mills*.

(g) The Pennsylvania Supreme Court responded to *Mills* by issuing a new standard capital sentencing verdict form. The differences between the post-*Mills* standard form and the *Abu-Jamal* form further highlight the *Mills* violation herein.

At the time of Mr. Abu-Jamal's sentencing, before *Mills*, Pennsylvania did not require trial courts to use a particular sentencing verdict form. In response to *Mills*, on February 1, 1989, the Pennsylvania Supreme Court issued new rules which, for the first time, required trial courts to use a standard form. Since then, Pennsylvania's Rules of Criminal Procedure require that, "[i]n all cases in which the sentencing proceeding is conducted before a jury, the judge shall furnish the jury with a jury sentencing verdict slip in the form provided by Rule 808." Rule 807(A)(1).

The post-*Mills* form required by Rules 807 and 808 was designed to comply with *Mills*. It specifies that aggravating circumstances must be unanimously found, and a death sentence must be unanimous, but mitigating circumstances may be found by "one or more" of the jurors:

A. We, the jury, unanimously sentence the defendant to (check one):
___ Death
___ Life Imprisonment

B. The findings on which the sentence of death is based are (check one):

____ 1. At least one aggravating circumstance and no mitigating circumstance. The aggravating circumstance(s) unanimously found (is) (are): """""

____ 2. One or more aggravating circumstances which outweigh(s) any mitigating circumstance(s).

The aggravating circumstance(s) unanimously found (is) (are): _____

The *mitigating circumstance(s) found by one or more of us* (is) (are): ___ __

C. The findings on which the sentence of life imprisonment is based are (check one):

____ 1. No aggravating circumstance exists.

____ 2. The mitigating circumstance(s) (is) (are) not outweighed by the aggravating circumstance(s).

The *mitigating circumstance(s) found by one or more of us* (is) (are): _____

The aggravating circumstance(s) unanimously found (is) (are): _____

_____ DATE _____JURY FOREPERSON

Rule 808. Thus, the post-*Mills* form makes clear that any individual juror can find and consider a mitigating circumstance, even if no other juror agrees.

In *Mills*, this Court described similar verdict form changes made by the Maryland court, and concluded: "We can and do infer from these changes at least *some* concern on the part of that court that juries could misunderstand the previous instructions as to unanimity and the consideration of mitigating evidence by individual jurors." 486 U.S. at 382 (emphasis in *Mills*). Similarly, here, the Pennsylvania Supreme Court's post-*Mills* adoption of a verdict form that is significantly different from the *Abu-Jamal* form further highlights the existence of a *Mills* violation herein.

(h) In short, the *Abu-Jamal* verdict form *plainly requires* that mitigating circumstances be *unanimously* found. There is more than a "reasonable likelihood" that the form was understood in a *Mills*-violating way – the jury would have to *disobey the form's plain language and structure* in order to comply with *Mills*.

2. The oral instructions: Since the verdict form violates *Mills*, this death sentence is unconstitutional unless the oral instructions somehow cured the error by making the jury understand the form as meaning something other than what its plain language states. Nothing in the oral instructions even comes close to doing so. Instead, the oral instructions *compound* the *Mills* error. *See*

Abu-Jamal-3, App. 154-65, 168; *Abu-Jamal-4*, App. 76-78, 81-82.[4]

(a) The oral instructions on how to use the form compound the form's *Mills* error.

The judge first stated: "You will be given a verdict slip upon which to record your verdict and findings." App. 182. Here, and throughout, the judge made *no distinction* between "findings" of aggravating circumstances and "findings" of mitigating circumstances (except for different burdens of proof, *see infra*); thus, the jury had no reason to believe there was any difference (except for different burdens of proof)—both must be unanimous.

The judge then instructed on how to use the checklist of aggravating circumstances on Page Two and complete Page One where it says "[t]he aggravating circumstance(e) is/are _____":

> [W]hat you do, you go to Page 2. Page 2 lists all the aggravating circumstances. They go from small letter (a) to small letter (j). Whichever one of these that you find, you put an "X" or check mark there and then, put it in the front. Don't spell it out, the whole thing, just what letter you might have found.

App. 183.

The judge then used *materially identical language* regarding how to use Page Three's checklist of *mitigating* circumstances and how to complete Page One where it says "[t]he *mitigating* circumstance(e) is/are _____":

> [T]hose mitigating circumstances appear on the third page here. They run from a little (a) to a little letter (h). And whichever ones you find there, you will put an "X" mark or check mark and then, put it on the front here at the bottom, which says mitigating circumstances. And you will notice that on the third or last page, it has a spot for each and every one of you to sign his or her name on here as jurors . . . .

App. 184.

These instructions treat aggravating and mitigating circumstances *identically* as things to be

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4. Mr. Abu-Jamal need not establish that the oral instructions violated *Mills*; it is sufficient to show that they did not *cure* the form's *Mills* error. Nevertheless, the oral instructions *did* violate *Mills*, as set forth below.

"found" and recorded by the *unanimous jury*. The instructions do not even hint that an aggravation finding must be unanimous but a mitigation finding need not be. And the last instruction on finding mitigating circumstances and signing the form "places in the closest temporal proximity the task of finding the existence of mitigating circumstances and the requirement that each juror indicate his or her agreement with the findings of the jury" by signing the form. *Abu-Jamal-3*, App. 163-64. These instructions thus show "a reasonable likelihood that the jury believed that it was precluded from considering mitigating circumstances that were not unanimously found to exist." *Id.*, App. 164. The instructions on how to use the form thus contribute to the form's *Mills* error.

(b) The judge also instructed:

> Members of the jury, you must now decide whether the defendant is to be sentenced to death or life imprisonment. The sentence will depend upon your findings concerning aggravating and mitigating circumstances. The Crimes Code provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.
>
> . . . .
>
> Remember, that your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstance. Or, if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. In all other cases, your verdict must be a sentence of life imprisonment.

App. 179-82.

Because these instructions "used the word 'unanimously' 'in close proximity to . . . the mitigating circumstances clause' . . . [,] [t]he effect of the temporal proximity of these two concepts was the creation of 'one sound bite' in which the requirement of unanimity and the enterprise of finding mitigating circumstances, to which that requirement does not rightfully apply, were joined." *Abu-Jamal-3*, App. 143-44 (footnote omitted).

Moreover, here and throughout, the instructions treat aggravating and mitigating circumstances *identically* and the jury had no reason to treat them differently. In short, "there was no de-

fensible linguistic construction of the[se] . . . instructions apart from [a conclusion that] the unanimity requirement pertained to the jury's task of determining the existence of mitigating circumstances," in violation of *Mills*. *Abu-Jamal-3*, App. 144.

(c) The judge also instructed on the different burdens of proof for aggravating and mitigating circumstances:

> Whether you sentence the defendant to death or to life imprisonment will depend upon what, if any, aggravating or mitigating circumstances you find are present in this case. . . . Aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt, while mitigating circumstances must be proved by the defendant by a preponderance of the evidence.
>
> . . . .
>
> The Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt. The defendant has the burden of proving mitigating circumstances, but only be a preponderance of the evidence. This is a lesser burden of proof than beyond a reasonable doubt.

App. 181.

Since the instructions stressed the different *burdens* for proving aggravating and mitigating circumstances, but were otherwise silent as to any differences in the *manner* of proof, jurors would naturally conclude that *both* "aggravating *and* mitigating circumstances must be discussed and unanimously agreed to, as is typically the case when considering whether a burden of proof has been met." *Frey v. Fulcomer*, 132 F.3d 916, 924 (3d Cir. 1997). "Such an understanding . . . is plainly inconsistent with the requirements of *Mills*," and "adds to [the] concern that the jury could have understood the charge to require unanimity in consideration of mitigating evidence." *Frey*, 132 F.3d at 924. In short, the burden of proof instructions "likely cemented the jury's mistaken impression that it was obligated *not* to consider a mitigating circumstance that was found to exist by anything other than the entire panel." *Abu-Jamal-3*, App. 145 (emphasis in *Abu-Jamal-3*); *see also Abu-Jamal-4*, App. 81-82 (same conclusion).

(d) Throughout the instructions, the pronoun "you" was used to refer without distinction to the entity that reaches a guilty verdict, that sentences, that "finds" aggravating circum-

stances, and that "finds" mitigating circumstances.[5] To reach a *Mills*-compliant understanding of the instructions, the jury would have to know that "you" meant the *unanimous jury* for the first three matters, but meant *each individual juror* for the last. But *nothing* in the instructions even remotely suggested that. The "natural interpretation," *Mills*, 486 U.S. at 381, of the instructions was that the same "you"—the unanimous jury—did all of these things.

(e) After *Mills*, Pennsylvania's standard instructions were changed, as was the verdict form, *see supra*. The post-*Mills* standard instructions state, *inter alia*:

> [Y]ou are to regard a particular aggravating circumstance as present only if you all agree that it is present. On the other hand, each of you is free to regard a particular *mitigating* circumstance as present despite what other jurors may believe. This is different from the general findings to reach your ultimate sentence of either life in prison or death. The specific findings as to any particular aggravating circumstance must be unanimous. All of you must agree that the Commonwealth has proven it beyond a reasonable doubt. That is not true for any mitigating circumstance. Any circumstance that any juror considers to be mitigating may be considered by that juror in determining the proper sentence.

Pennsylvania Suggested Standard Criminal Jury Instruction 15.2502H (emphasis in original). This post-*Mills* change to the instructions, like the post-*Mills* change to the verdict form, confirms that the instructions given here violated *Mills*. *Id.*, 486 U.S. at 382.

(f) In short, the oral instructions violated *Mills*; they did *not* cure the form's *Mills* error.

B. The District Court and Third Circuit Did Not Err When They Unanimously Found That Relief Is Appropriate under § 2254(d)

The District Court and Third Circuit correctly found that the state court decision denying this claim was objectively unreasonable under clearly established Supreme Court law, requiring habeas

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5. In addition to the instructions already quoted, *see* NT 7/3/82 at 2-3 ("Ladies and gentlemen of the jury, *you* have found the defendant guilty of murder in the first degree, and *your* verdict has been recorded. We are now going to hold a sentencing hearing during which . . . *you* will decide whether the defendant is to be sentenced to death or life imprisonment. Whether *you* sentence the defendant to death or life imprisonment will depend upon what, if any, aggravating or mitigating circumstances *you* find are present in this case."). Again, there is *no distinction* between guilt-finder, sentence-finder and finder of aggravating and *mitigating* circumstances.

relief under AEDPA's § 2254(d)(1). In fact, the state court decision is both "contrary to" and "an unreasonable application of" this Court's clearly established law, for several reasons.

1. In denying relief, the Pennsylvania Supreme Court first complained that Mr. Abu-Jamal "offered absolutely no evidence in support of this claim at the PCRA hearing." *Abu-Jamal-2*, App. 172. It is contrary to clearly established law, including *Mills*, to denigrate a challenge to a *jury instruction* because the defendant has not presented "evidence" to support the claim. *Mills*, 486 U.S. at 381 ("There is, of course, *no extrinsic evidence* of what the jury in this case actually thought. We have before us only the verdict form and the judge's instructions."); *Kelly v. South Carolina*, 534 U.S. 246, 256 (2002) ("Time after time appellate courts have found jury instructions to be insufficiently clear without any record that the jury manifested its confusion"). Here, as in *Mills* and most other cases challenging jury instructions, the claim is based upon "the verdict form and the judge's instructions." 486 U.S. at 381. The Pennsylvania Supreme Court's belief that the claim fell short because Mr. Abu-Jamal did not present "evidence" is contrary to this clearly established law.

2. Regarding the verdict form, the Pennsylvania Supreme Court noted that it "consisted of three pages" and stated (we have lettered each sentence for future reference):

> [a] The requirement of unanimity is found only at page one in the section wherein the jury is to indicate its sentence. [b] The second page of the form lists all the statutorily enumerated aggravating circumstances and includes next to each such circumstance a designated space for the jury to mark those circumstances found. [c] The section where the jury is to checkmark those mitigating circumstances found, appears at page three and includes no reference to a finding of unanimity. [d] Indeed, there are no printed instructions whatsoever on either page two or page three. [e] The mere fact that immediately following that section of verdict slip, the jurors were required to each sign their name is of no moment since those signature lines naturally appear at the conclusion of the form and have no explicit correlation to the checklist of mitigating circumstances. . . . [f] Moreover, verdict slips similar to that employed in the instant matter have been held by our court not to violate the dictates of *Mills*. *See e.g. Commonwealth v. Murphy*, 657 A.2d 927 (Pa. 1995).

Abu-Jamal-2, App. 174. The Court said *nothing* about the trial judge's oral instructions.

This treatment of the verdict form is unreasonable for several reasons.

(a) The Pennsylvania Supreme Court's claim that the "requirement of unanimity

is found only at page one in the section wherein the jury is to indicate its *sentence*" is contrary to the record. In addition to stating "We, the jury unanimously *sentence* the defendant to death," Page One of the form also states:

> We, the jury, have found *unanimously* . . .
> The aggravating circumstance(s) is/are ____A____.
> The *mitigating circumstance(s) is/are* ____A____.

Thus, Page One's "requirement of unanimity" *expressly applied* to both aggravating and *mitigating* circumstances.

Moreover, in addition to this express use of the word "unanimously," the form opens with the requirement that *everything on the form* must be the "find[ings]" of "the jury" that found Mr. Abu-Jamal guilty – *i.e.*, the *unanimous* jury. This applies to Page One's finding that the "*mitigating* circumstance(s) is/are """ and Page Three's checklist of *mitigating* circumstances *just as clearly* as it applies to Page One's finding that the "aggravating circumstance(s) is/are """ and Page Two's checklist of aggravating circumstances. Moreover, the form closes with a requirement that *all twelve jurors* sign it, reinforcing the form's opening statement that all findings – including mitigating circumstances – must be by the unanimous jury. The Pennsylvania Supreme Court, however, "never addressed the effect of the lead-in language." *Abu-Jamal-3*, App. 165 n.91.

The Pennsylvania Supreme Court simply ignored these ways (and others, described herein) in which the form imposed a "requirement of unanimity"; thus, the Pennsylvania Supreme Court unreasonably applied *Mills*. *See Williams*, 529 U.S. at 397-98 (state court decision "unreasonable insofar as it failed to evaluate the totality of" relevant facts).

(b) The Pennsylvania Supreme Court correctly stated that Page Two "lists all the . . . aggravating circumstances and includes next to each such circumstance a designated space for the jury to mark those circumstances found" – *i.e.*, an aggravating circumstance was checked on Page Two only if the "*the jury*," not an *individual juror*, "found" it. This is a proper requirement. What the Pennsylvania Supreme Court unreasonably failed to recognize is that the list of *mitigating* cir-

cumstances on Page Three is *identical* in format to the aggravating circumstances list. Thus, it was natural for the jury to believe that mitigating circumstances, like aggravating circumstances, must be *unanimously* found, in violation of *Mills*. The jury had no reason to believe it should treat the list of mitigating circumstances any differently than the list of aggravating circumstances.

(c) The Pennsylvania Supreme Court also unreasonably applied *Mills* when it relied on the fact that Page Three, which has the mitigating circumstances checklist, "includes no reference to a finding of unanimity." As stated above, the form opens with a requirement that *everything* thereon be found by the *unanimous* jury; the form ends – on Page Three itself, just below the checklist of mitigating circumstances – with a requirement that all twelve jurors sign, indicating their *unanimous* agreement with *everything* on the form; the form treats aggravating and mitigating circumstances identically. This shows, at least, a reasonable likelihood that the jury believed it had to unanimously find a mitigating circumstance. Indeed, Page Two, the aggravating circumstances list, is just as bereft of a "reference to a finding of unanimity" as Page Three, yet it is undisputed that the jury knew it had to find aggravating circumstances unanimously.

Even the *Pennsylvania Supreme Court's own description* of Page Three shows that Page Three, in the context of entire form, requires unanimity for finding a mitigating circumstance. As the Pennsylvania Supreme Court stated, Page Three is the "section where *the jury* is to checkmark those mitigating circumstances *found*." *Abu-Jamal-2*, App. 174. There is, at least, a reasonable likelihood that the jury understood Page Three in exactly that way – only mitigating circumstances "*found*" *by* "*the jury*," not by *individual jurors*, should be considered. To use Page Three in a way that satisfies *Mills*, the jury would have to know that *each juror* should check those mitigating circumstances *found by him or her*, even if the other jurors disagreed. To say the least, that is an odd reading of the form. And the jury would have to give this strange treatment to mitigating circumstances but *not* aggravating circumstances, despite the fact that aggravating and mitigating circumstances are treated identically on the form.

(d) The Pennsylvania Supreme Court noted that "there are no printed instructions whatsoever on either page two [listing aggravating circumstances] or page three [listing mitigating circumstances]" of the form, but the Pennsylvania Supreme Court unreasonably failed to recognize that this *contributes to* the *Mills* error. Because there are no printed instructions on the pages listing the aggravating and mitigating circumstances, the jury had to look to the other parts of the form, the overall structure of the form, and the oral instructions to understand what to do with those lists. As set forth herein, all of those factors – *e.g.*, the identical treatment, apart from burdens of proof, of aggravating and mitigating circumstances; Page One's opening requirement that everything on the form must be unanimously found; Page One's requirement that the jury record only the "aggravating circumstance(s)" and "*mitigating circumstance(s)*" that "We, the jury, have found *unanimously*"; Page Three's requirement that all twelve jurors show their agreement to the findings by signing the form; and the oral instructions on how to use the form—indicated that both aggravating and mitigating factors must be unanimously found.

(e) The Pennsylvania Supreme Court also unreasonably applied *Mills* when it said Page Three's signatures-of-all-jurors requirement "is of no moment since those signature lines naturally appear at the conclusion of the form and have no explicit correlation to the checklist of mitigating circumstances." The reason it is "natural[]" for the twelve signatures to "appear at the conclusion of the form" is that it *signifies the agreement of all twelve jurors* to the *findings recorded on the form*. This is especially obvious here, where the form *opens* with a requirement that everything thereon be the findings of the *jury*, not individual jurors.

To the extent the signatures "have no explicit correlation to the checklist of mitigating circumstances," *exactly the same* is true for the checklist of *aggravating circumstances* and the *sentence*. To satisfy *Mills*, the jurors would have to know that signing the form signaled *agreement* to the sentence and *agreement* to the findings of aggravating circumstances, but was *meaningless* with respect to mitigating circumstances. Nothing in the form or instructions conveyed that bizarre con-

cept.

Even if the Pennsylvania Supreme Court's "reasoning" about the signatures made any sense in isolation, the Pennsylvania Supreme Court unreasonably failed to consider the trial judge's "explanation of th[e] form" in his oral instructions. *Abu-Jamal-3*, App. 164. As stated above, part A.2, and as the District Court found, *see Abu-Jamal-3*, App. 163-64, the oral instructions on how to use Page Three *did* make an "explicit correlation" between the signatures and the mitigating circumstances and, thus, cemented the *Mills*-violation that is apparent on the face of the form. The state court unreasonably failed to consider the effect of the oral instructions on the jury's understanding of the form.

(f) The Pennsylvania Supreme Court added nothing to the above-described analysis when it concluded by asserting that it previously had approved a "verdict slip[] similar to" the *Abu-Jamal* slip, in *Commonwealth v. Murphy*, 657 A.2d 927 (Pa. 1995). The entire discussion of the verdict slip in *Murphy* is that "the portion of the verdict slip where the jury is to list mitigating circumstances is set apart from sections A and B of the verdict slip which do require a finding of unanimity." 657 A.2d at 936. There is no description of what the *Murphy* verdict slip actually said.

3. The Pennsylvania Supreme Court's failure to consider the oral instructions on how to use the form, *see* part 2.e, *supra*, is symptomatic of its general violation of the clearly established law that a "single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Boyde*, 494 U.S. at 378. The Pennsylvania Supreme Court looked at each page of the form *in isolation* from the other parts of the form and from the form's overall structure, and *failed to consider the oral instructions at all*. The state court decision is thus contrary to or, at least, an unreasonable application of, *Mills* and *Boyde*. *See Abu-Jamal-3*, App. 152-54 (Pennsylvania Supreme Court unreasonably considered "only the verdict sheet" and never undertook the analysis required by *Boyde* and *Mills*); *id.*, App. 168 ("Pennsylvania Supreme Court failed even to address the *Boyde* standard or the consequence of the jury instructions in this case");

Abu-Jamal-4, App. 78 (Pennsylvania Supreme Court unreasonably "reached this conclusion [denying relief] without evaluating whether there was a reasonable likelihood that the jury could have misinterpreted the entire scheme employed at the sentencing phase, that is, the structure and substance of the verdict form together with the oral instructions from the judge."); *id.*, App. 80 ("It was unreasonable for the Pennsylvania Supreme Court" to deny relief "based on only a portion of the form, rather than the entire form, and without evaluating . . . the judge's jury instructions and the entire verdict form together.").

4. Even aside from the many flaws in its analysis, described above, the Pennsylvania Supreme Court's decision is "objectively unreasonable," *Williams*, 529 U.S. at 409, simply because it is unreasonable to fail to find a *Mills* violation on this record. The verdict form *plainly requires* that mitigating circumstances be unanimously found; the oral instructions themselves violate *Mills*, and certainly do not cure the form's *Mills* error. It was unreasonable for the Pennsylvania Supreme Court to fail to find a "reasonable likelihood" that the jurors understood the form and instructions in a way that violated *Mills*.

C. The Commonwealth's Arguments are Erroneous

The Commonwealth's arguments for "reasonableness" of the state court decision are erroneous.

1. The Commonwealth says "the state court could not have misapplied 'clearly established' federal law" because, supposedly: in *Mills* "it was undisputed that jurors had been *explicitly* instructed that unanimity was required to find mitigating circumstances"; while in *Abu-Jamal* the unanimity requirement was not "explicit." *Petition* at 7, 9 (emphasis in *Petition*); *see generally id.* at 7-14 (same argument). The Commonwealth errs, for several reasons.

First, the *Mills* instructions were not "explicit" in the way the Commonwealth suggests. There was a "plausible" "construction of the [*Mills*] jury instructions and verdict form," taken as a whole, that did *not* require unanimity. 486 U.S. at 377; *see also id.* at 382 (instructions and form

suffered from "*ambiguity*"). This Court reiterated this in *McKoy v. North Carolina*, 494 U.S. 433, 444 n.8 (1990), when the Court contrasted the "express" unanimity requirement in *McKoy* with the ambiguous situation in *Mills*:

> In *Mills*, the Court divided over the issue whether a reasonable juror could have interpreted the instructions in that case as allowing individual jurors to consider only mitigating circumstances that the jury unanimously found. . . . In [*McKoy*], *by contrast*, the instructions and verdict form *expressly* limited the jury's consideration to mitigating circumstances unanimously found.

494 U.S. at 444 n.8; *see also id.* at 445 (Blackmun, J., concurring) (Mills "instructions were held to be invalid because they were susceptible of two plausible interpretations, *and under one of those interpretations the instructions were unconstitutional*") (emphasis in original).

Second, the *Abu-Jamal* verdict form and instructions were as "explicit" in their unanimity requirement as those in *Mills*. As set forth above, part A, the verdict form's opening statement expressly told the jury that *all of its findings* on the form – including the sentence, aggravating circumstances and *mitigating* circumstances – should be findings of the unanimous jury; the verdict form expressly told the jury to record and consider only mitigating circumstances that "We, the jury, have found unanimously"; and the oral instructions reinforced these *Mills*-violating rules. Moreover, the *Abu-Jamal* verdict form is not even subject to the "plausible" saving construction given the *Mills* form by the Maryland courts. *See* part A.1.f, *supra*.

Third, even if an "explicit"/non-"explicit" distinction had any weight, it is irrelevant to the reasonableness *vel non* of the state court decision because the state court did not rely on that distinction. Because the Commonwealth's argument was not relied upon by the state court, that argument "has no bearing on whether the [state court] decision reflected an objectively unreasonable application" of clearly established law. *Wiggins v. Smith*, 539 U.S. 510, 529-30 (2003).

Finally, the Commonwealth is far off the mark when it claims that "the state court could not have misapplied 'clearly established' federal law," *Petition* at 7, simply because there are factual differences between *Mills* and *Abu-Jamal*.

> AEDPA does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Carey v. Musladin*, 549 U.S. 70, —, 127 S.Ct. 649, 656 (2006) (Kennedy, J., concurring in judgment). Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts "different from those of the case in which the principle was announced." *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003). The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner. *See, e.g., Williams v. Taylor*, 529 U.S. 362 (finding a state-court decision both contrary to and involving an unreasonable application of the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)).

Panetti v. Quarterman, 127 S.Ct. 2842, 2858 (2007) (parallel citations omitted).

Mills and *Boyde* establish a "general standard," *Panetti*, that jury instructions violate the Eighth Amendment when there is a "reasonable likelihood" that the jury interpreted the instructions as requiring a unanimous mitigation finding, *Mills*; *Boyde*, 494 U.S. at 378, 380. The District Court and Third Circuit did not err when they found that the state court failed to reasonably apply the *Mills/Boyde* standard.

2. The Commonwealth says the state court must be "reasonable" because the Third Circuit, in *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir. 1991), denied a *Mills* claim involving what supposedly were "instructions virtually identical to those here." *Petition* at 17; *see also id.* at 1, 5, 18-22 (same argument about *Zettlemoyer*).[6] This argument is frivolous.

The Commonwealth's claim that the *Zettlemoyer* "instructions [were] virtually identical to those here" is utterly wrong. In making this claim, the Commonwealth quotes *one sentence* of the *oral* instructions given in *Zettlemoyer*. *See Petition* at 17 n.6. While *this single sentence* is "linguis-

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6. The *Zettlemoyer* panel split 2-1 on the merits of the *Mills* claim. *See* 923 F.2d at 306-08 (majority opinion that *Mills* was not violated); *id.* at 316-17 n.3 (opinion of Sloviter, J.) ("I believe that the instruction and verdict slip violated the holding in *Mills* . . . . [However], I believe it is likely that the Supreme Court would view *Mills* as announcing a new rule and thus this claim . . . is subject to the almost insurmountable barrier on retroactive application announced in *Teague*.").

tically similar" to *one part* of the *oral* instructions given in *Abu-Jamal*, there are "important distinctions" between the *Zettlemoyer* and *Abu-Jamal* oral instructions as a whole. *Abu-Jamal-3*, App. 145; *see id.*, App. 158-65 (describing "numerous aspects" of the *Abu-Jamal* oral instructions that materially differ from the *Zettlemoyer* oral instructions).

More significantly, there are *vast differences* between the *verdict forms* in *Zettlemoyer* and *Abu-Jamal*. *See Abu-Jamal-3*, App. 142, 166 n.92 (describing some ways in which *Abu-Jamal* verdict "sheet differed significantly from that used in *Zettlemoyer*"). The Commonwealth does not even claim that the *Zettlemoyer* verdict form was "virtually identical" to the *Abu-Jamal* form – the Commonwealth never mentions the *Zettlemoyer* form. Even if it is falsely assumed that the *Zettlemoyer* oral instructions were *identical* to those given here, the differences in the *verdict forms* make this a very different case from *Zettlemoyer*.

The *Zettlemoyer* verdict form stated:

> 1. We the jury unanimously sentence the defendant to: [X] death ___ life imprisonment.
> 2. (To be used in the sentence if death)
> We the jury have found unanimously:
> ___ at least one aggravating circumstance and no mitigating circumstance. The aggravating circumstance is _____.
> [X] the aggravating circumstance outweighs [the] mitigating circumstances. The aggravating circumstance is [the murdering of a prosecution witness to prevent testimony in a felony case.]

Zettlemoyer, 923 F.2d at 308 (footnote omitted); *see also Abu-Jamal-3*, App. 141-42 (quoting *Zettlemoyer* form).

In finding the *Zettlemoyer* form unobjectionable, the Third Circuit stressed two things about that form, both of which materially distinguish the *Zettlemoyer* form from the *Abu-Jamal* form.

First, the *Zettlemoyer* form said "We the jury have found unanimously . . . The aggravating circumstance is "_____," but there was *no such language* for *mitigating* circumstances. 923 F.2d at 308. "This language requires that the jury's conclusion on the particular aggravating circumstance must be unanimous. The *absence of a similar instruction for mitigating circumstances indicates that una-*

nimity is not required." *Id.* In sharp contrast, the analogous part of the *Abu-Jamal* form contains identical language for aggravating *and* mitigating circumstances: "We, the jury, have found *unanimously* . . . The aggravating circumstance(s) is/are _____. The *mitigating circumstance(s) is/are* _____." *See also* part A.1, *supra* (quoting *Abu-Jamal* form). Thus, on the *Abu-Jamal* form the *presence* of "a similar instruction for mitigating circumstances indicates that unanimity" *is required.*

Second, on the *Zettlemoyer* form, while "the jury was obliged to specify the aggravating circumstance it found, it had no such duty with respect to mitigating circumstances, thus suggesting that consideration of mitigating circumstances was broad and unrestricted." 923 F.2d at 308. Again, the *Abu-Jamal* form is very different—the *Abu-Jamal* form requires the jury to specify *both* the aggravating circumstances *and* the mitigating circumstances it found, with no distinction made between the two. Thus, the *Abu-Jamal* form requires that both aggravating and mitigating circumstances be unanimously found.

In short, the *Abu-Jamal* form suffers from *exactly* the *Mills*-violating features that the Third Circuit found *absent* from the *Zettlemoyer* form. Moreover, the *Abu-Jamal* form requires a unanimous mitigation finding for additional reasons that also were absent from the *Zettlemoyer* form. *See* part A, *supra*. There is no basis for the Commonwealth's claim that the *Zettlemoyer* and *Abu-Jamal* instructions are materially identical.

3. The Commonwealth says the state court "could not have been unreasonable" because some Courts of Appeal have denied *Mills* claims arising in other states "where there [wa]s no explicit unanimity requirement" for mitigating circumstances. *Petition* at 14-15; *see id.* at 13-17, 21-22 (same argument). The Commonwealth's argument fails for reasons similar to those discussed above – *e.g.*, *Mills* and *Boyde* do not draw the line between "explicit" and non-"explicit," they distinguish between instructions that are "reasonably likely" to make the jury believe it must unanimously find mitigation and those are not "reasonably likely" to do so; the *Abu-Jamal* verdict form actually *is*

"explicit" in requiring unanimity for mitigating circumstances; the instructions and verdict forms in the cases cited by the Commonwealth do not have the features of the *Abu-Jamal* form and instructions that make the *Abu-Jamal* form and instructions violative of *Mills*.

II. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE COMMONWEALTH'S QUARREL IS WITH THE LOWER COURTS' APPLICATION OF PROPERLY STATED RULES OF LAW TO THE FACTS OF THIS CASE

A petition for a writ of certiorari "is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Supreme Court Rule 10. Here, the District Court and the Third Circuit applied to the facts of this case "properly stated rule[s] of law" for both (1) the constitutional merits of the *Mills* claim and (2) the deference due the state court decision under AEDPA. Thus, certiorari should be denied.

A. The District Court and the Third Circuit Expressly Applied the Correct Rule of Federal Constitutional Law

It is undisputed that the applicable rule of federal constitutional law is that of *Mills v. Maryland*, 486 U.S. 367 (1988), as clarified by *Boyde v. California*, 494 U.S. 370 (1990). *See Petition* at 11, 14. Under *Boyde*, the "proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." 494 U.S. at 380.

Both the District Court and the unanimous Third Circuit *expressly recognized* that *Boyde*'s "reasonable likelihood" standard applies here and *expressly applied* that standard to the facts of Mr. Abu-Jamal's case. *See* Counterstatement of the Case §§ B-C (quoting District Court and Third Circuit decisions); *Abu-Jamal-4*, App. 6 ("whether the jury charge and sentencing verdict sheet violated Abu-Jamal's constitutional rights under *Mills v. Maryland*, 486 U.S. 367 (1988), and *Boyde v. California*, 494 U.S. 370 (1990)"), App. 66 ("The District Court granted relief on Abu-Jamal's claim that the jury instructions and verdict form employed in the sentencing phase of Abu-Jamal's trial were constitutionally defective under *Mills v. Maryland*, 486 U.S. 367 (1988), and *Boyde v. California*, 494 U.S. 370 (1990) The District Court found a 'reasonable likelihood that the jury has applied the .

. . instruction [and form] in a way that prevents the consideration of constitutionally relevant evidence' regarding the existence of mitigating circumstances . . ." (quoting *Boyde*)), App. 73 ("We must determine whether the Pennsylvania Supreme Court decision was unreasonable in light of *Mills* and *Boyde*."), App. 74-75 ("In *Mills*, the Court posed '[t]he critical question . . . whether petitioner's interpretation of the sentencing process is one a reasonable jury could have drawn from the instructions given by the trial judge and from the verdict form employed in this case.' *Id.* at 375-76. In *Boyde v. California* 494 U.S. 370 (1990), the Supreme Court clarified the legal standard as 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.' *Id.* at 380."), App. 78 (proper inquiry is "whether there was a reasonable likelihood that the jury could have misinterpreted the entire scheme employed at the sentencing phase, that is, the structure and substance of the verdict form together with the oral instructions from the judge"), App. 79 ("The District Court found the Pennsylvania Supreme Court's decision was objectively unreasonable under *Mills* and *Boyde*."), App. 80 ("The [District C]ourt concluded the verdict form and jury instructions 'created a reasonable likelihood that the jury believed that it was precluded from considering a mitigating circumstance that had not been found unanimously to exist.'"), App. 80 ("We agree the Pennsylvania Supreme Court's [decision was an] unreasonable application of *Mills* and *Boyde*."), App. 81 (court must evaluate "whether this language would create a reasonable likelihood the jury had applied the form in violation of *Mills*"), App. 83 ("We conclude the Pennsylvania Supreme Court's decision was objectively unreasonable under the dictates of *Mills* and *Boyde*. The jury instructions and the verdict form created a reasonable likelihood that the jury believed it was precluded from finding a mitigating circumstance that had not been unanimously agreed upon."); *Abu-Jamal-3*, App. 127-28 (asking "whether there is a reasonable likelihood that the jury [as opposed to a reasonable individual juror] has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence" (quoting *Boyde*, bracketed material in original), App. 128 n.80 ("the Third Circuit repeatedly

has noted the applicability of the *Boyde* standard in assessing *Mills* claims"), App. 128 n.80 ("There is no dispute, . . . indeed, [Third Circuit decisions] *Frey* and *Banks* make this point explicitly—that the standard to be applied to *Mills* claims is that articulated in *Boyde*. Accordingly, I am concerned in evaluating petitioner's *Mills* claim with whether there is 'a *reasonable likelihood* that the jury *has* applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.' *Boyde*, 494 U.S. at 380 (emphasis added)."), App. 153 (under *Mills* and *Boyde*, question is "whether the charge created a reasonable likelihood that the jury applied the instruction in a way that prevented the consideration of constitutionally relevant evidence"), App. 158 ("There are numerous aspects of this [*Abu-Jamal*] charge that created a reasonable likelihood that the jury believed that it was obligated to consider only mitigating circumstances that were found to exist by a unanimous panel."), App. 162-63 (quoting *Boyde* as requiring determination as to whether there is "a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence"), App. 163 ("This further indicates that there is a reasonable likelihood that the [*Abu-Jamal*] jury believed that this specific articulation of the unanimity requirement pertained to its task of finding mitigating circumstances."), App. 164 ("this aspect of the instructions indicates that there is a reasonable likelihood that the jury believed that it was precluded from considering mitigating circumstances that were not unanimously found to exist"), App. 168 ("To conclude, the jury charge and verdict form in this case created a reasonable likelihood that the jury believed that it was precluded from considering a mitigating circumstance that had not been found unanimously to exist."), App. 169 ("the jury charge and verdict form produced a 'reasonable likelihood that the jury has applied the . . . instruction [and form] in a way that prevents the consideration of constitutionally relevant evidence.' *Boyde*, 494 U.S. at 380.").

The Commonwealth, however, claims that the Third Circuit did not apply *Boyde*. Instead, according to the Commonwealth:

Under the Third Circuit's view of *Mills*, relief is required if one may posit a "risk of

> confusion," 520 F.3d at 303 (App. 82), such that jurors hearing that unanimity applies to some aspects of the capital sentencing decision might, without being told, assume unanimity is also necessary to finding mitigating circumstances.

Petition at 8; *see also Petition* at 6, 9, 11, 12, 14, 21 (asserting that Third Circuit applied a "risk of confusion" standard).

The Commonwealth's assertion is frivolous, given how clearly the Third Circuit identified and applied *Boyde* as the controlling standard. The Third Circuit never held or even suggested that the constitutional test is "risk of confusion." Instead, the Third Circuit used the "risk of confusion" language to describe the likely effect of *one part* of the instructions – the burden of proof instructions. *See* App. 82 ("The risk of confusion is higher where the court distinguishes between aggravating and mitigating circumstances on one ground [burden of proof], but not on any other."). As to the verdict sheet and instructions *as a whole*, the Third Circuit repeatedly made clear that *Boyde*'s "reasonable likelihood" standard applies, as set forth above. Indeed, the Third Circuit criticized the Pennsylvania Supreme Court for *failing to apply* the *Boyde* standard, *see* App. 81 ("The Pennsylvania Supreme Court did not evaluate whether this language would create a reasonable likelihood the jury had applied the form in violation of *Mills*."), as did the District Court, *see* App. 154 ("the Pennsylvania Supreme Court never mentioned, much less did it apply, the *Boyde* standard for evaluating claims pursuant to *Mills*").

That the Third Circuit identified and applied the *Boyde* "reasonable likelihood" standard, rather than a "risk of confusion" standard, is also highlighted by the fact that the Third Circuit praised the District Court's opinion for having "thoroughly explored" the *Mills* claim. The Commonwealth does not even contend that the *District Court* used a "risk of confusion" standard or any other improper standard – it is undisputed that the District Court applied *Boyde*'s "reasonable likelihood" standard. Thus, the Third Circuit's glowing review of the District Court's opinion confirms that the Third Circuit, like the District Court, applied *Boyde*.

B. The District Court and the Third Circuit Expressly Applied the Correct Law of Deference to the State Court under 28 U.S.C. § 2254(d)

Because the Pennsylvania Supreme Court decided the *Mills* claim on the merits, AEDPA's 28 U.S.C. § 2254(d)(1) applies, *i.e.*, habeas relief is appropriate if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

Both the District Court and the unanimous Third Circuit *expressly recognized* that § 2254(d)'s deferential standard applies here, and *expressly applied* that deferential standard to the facts of Mr. Abu-Jamal's case. *See* Counterstatement of the Case §§ B-C (quoting District Court and Third Circuit decisions); *Abu-Jamal-4*, App. 17 (§ 2254(d)(1) applies here; "the question . . . is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold" (quoting *Landrigan*, 127 S.Ct. at 1939, citing *Williams*, 529 U.S. at 410)), App. 51 (recognizing "AEDPA's deferential standard of review"), App. 53 n.21 (recognizing "the deferential standards provided by AEDPA § 2254(d)"), App. 55 (§ 2254(d)(1) applies here; it "creates an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings" and gives "binding [] directions to accord deference" (quoting and citing *Uttecht*, 127 S.Ct. at 2224; *Landrigan*, 127 S.Ct. at 1939; *Williams*, 529 U.S. at 413)), App. 72 ("Our review is limited to whether the Pennsylvania Supreme Court unreasonably applied *Mills*." (citing § 2254(d)(1); *Williams*, 529 U.S. at 405)), App. 73 ("We must determine whether the Pennsylvania Supreme Court decision was unreasonable"); *Abu-Jamal-3*, 2001 WL 1609690 at *10-*11 (recognizing that the United States Supreme Court has "cautioned federal habeas courts against insufficiently deferential review of state court decisions"; emphasizing that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law" (quoting *Williams*, 529 U.S. at 410); stating "It is important to recognize that AEDPA requires of federal habeas courts greater deference to state court applications of law to fact than did prior law." (citing *Williams*); AEDPA imposed "restriction[s] of independent federal re-

view"), *id.* at *107 ("Again, I stress that . . . a federal habeas court should ask whether the state court's application of clearly established federal law was objectively unreasonable, which is different from an incorrect application of federal law" (citing *Williams*); "AEDPA standard requires federal habeas courts to give greater deference to state court applications of law to fact than did prior law"), App. 132 ("The issue . . . is whether there was an unreasonable application of *Mills* in petitioner's case."), App. 132-33 n.82 ("[I]t is important to reiterate here that the standards under which [Mr. Abu-Jamal's] *Mills* claim must be evaluated are those set forth in the AEDPA. . . . Therefore, habeas relief will not be warranted pursuant to *Mills* if it is merely the case that, had I evaluated [Mr. Abu-Jamal's] *Mills* claim *ab initio*, I would have found it to be meritorious. . . . [A] significant degree of deference is due the state supreme court's application of federal law."), App. 135 (*Mills* claim "is subject to the strictures of § 2254(d)"), App. 169 (state court "decision was an objectively unreasonable application of federal law").

Given how clearly the District Court and Third Circuit identified and applied the correct rule of deference under § 2254(d), the Commonwealth's request for this Court's review should be denied.

III. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE ISSUES ON WHICH THE COMMONWEALTH SEEKS REVIEW ARE NOT OF NATIONAL IMPORTANCE AND ARE OF VERY LIMITED SIGNIFICANCE EVEN IN PENNSYLVANIA

The Commonwealth asks this Court to review the constitutionality under *Mills* and *Boyde* of the jury instructions given at Mr. Abu-Jamal's 1982 sentencing. As set forth above, § I.C.3, the *Abu-Jamal* instructions differ significantly from instructions given in other jurisdictions. Thus, the Commonwealth does not seek review of the type of "question[s] of national importance" that this Court grants certiorari to address. *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003). Given the local nature of the issues, certiorari should be denied.

Moreover, the issues presented by the Commonwealth are of very limited significance *even in Pennsylvania* – the issues can arise in only a small fraction of Pennsylvania capital cases, due to a combination of *Mills*' non-retroactivity, post-*Mills* changes made to Pennsylvania verdict forms and

instructions, and other factors.

This Court decided *Mills* on June 6, 1988. Under *Teague v. Lane*, 489 U.S. 288 (1989), the rule of *Mills* is available only to habeas petitioners whose convictions became final after that date. *Beard v. Banks*, 542 U.S. 406 (2004).

As set forth in § I, *supra*, Pennsylvania's courts quickly responded to *Mills* by changing verdict forms and instructions to ensure *Mills*-compliance; just a few months after *Mills*, the Pennsylvania Supreme Court began requiring standardized, *Mills*-compliant forms and instructions.

Because of this combination of the non-retroactivity of *Mills* and the post-*Mills* adoption of *Mills*-compliant verdict forms and instructions, only a narrow group of Pennsylvania capital cases may have *Mills* claims that would present the issues on which the Commonwealth seeks review. First, the case cannot be "too new"—it had to be tried *before Mills*, or at least before the February 1, 1989 official change in the verdict form. This eliminates every case *tried in the last twenty years*. Second, the case cannot be "too old"—it had to be final *after Mills*. This eliminates another significant body of cases. In addition, the *Mills* claim must survive all other habeas-related barriers, such as the exhaustion requirement and procedural default rules. Only a narrow set of cases can survive this "filtering" and present the issues for which the Commonwealth seeks review.

This limited relevance of *Mills* in Pennsylvania is reflected in the decisions of the Third Circuit. Apart from Mr. Abu-Jamal's case, the Third Circuit has addressed *Mills* claims in eight other Pennsylvania capital cases—*Zettlemoyer v. Fulcomer*, 923 F.2d 284, 306-08 (3d Cir. 1991); *Frey v. Fulcomer*, 132 F.3d 916, 920-25 (3d Cir. 1997); *Szuchon v. Lehman*, 273 F.3d 299, 320-24 (3d Cir. 2001); *Hackett v. Price*, 381 F.3d 281 (3d Cir. 2004); *Albrecht v. Horn*, 485 F.3d 103, 116-20 (3d Cir. 2007); *Fahy v. Horn*, 516 F.3d 169, 175-76 (3d Cir. 2008); *Banks v. Horn*, No. 99-9005 (3d Cir. Aug. 25, 2004); and *Kindler v. Horn*, 542 F.3d 70, 80-83 (3d Cir. 2008).

In *six* of these eight cases, the Third Circuit *denied relief* on the *Mills* claim. *See Zettlemoyer*; *Szuchon*; *Hackett*; *Albrecht*; *Fahy*; *Banks*. In three of these denials the Third Circuit de-

nied the *Mills* claim because it was barred by *Teague*. *See Banks*; *Albrecht*; *Fahy*. In one, the Third Circuit denied the *Mills* claim because it was procedurally defaulted. *See Szuchon*. In two, the Third Circuit denied the *Mills* claim on the merits—under pre-AEDPA *de novo* review in *Zettlemoyer* and under AEDPA's § 2254(d) in *Hackett*.

In just *two* of these eight cases, *Frey* and *Kindler*, did the Third Circuit grant relief under *Mills*. In both cases, habeas review was *de novo*, not under AEDPA's § 2254(d). In *Frey*, the claim *would have been denied* under *Teague* had the Commonwealth not waived its *Teague* defense. 132 F.3d at 920 n.4.

In short, the Third Circuit's *Mills* decisions highlight the limited availability of *Mills* in Pennsylvania due to the above-described combination of non-retroactivity, post-*Mills* changes to Pennsylvania's verdict forms and instructions, and other procedural issues; the rulings also show that even when the rare *Mills* claim survives that gauntlet of obstacles, the Third Circuit takes a nuanced approach which has led it to grant relief in some cases and deny it in others.

The Commonwealth cites six district court rulings on *Mills* claims—*Lambert v. Beard*, 2007 U.S. Dist. LEXIS 54047 (E.D. Pa. 2007); *Morris v. Beard*, 2007 U.S. Dist. LEXIS 44707 (E.D. Pa. 2007); *Williams v. Beard*, 2007 U.S. Dist. LEXIS 41310 (E.D. Pa. 2007); *Cross v. Price*, 2005 U.S. Dist. LEXIS 18510, 15-16 (W.D. Pa. 2005); *Thomas v. Beard*, 388 F.Supp.2d 489 (E.D. Pa. 2005); *Rollins v. Horn*, 2005 U.S. Dist. LEXIS 15493 (E.D. Pa. 2005). *See Petition* at 7. According to the Commonwealth, these cases show that the "*Mills* deference issues live on" and "show[s] no sign of abating." *Petition* at 7, 22; *see also id.* at 1, 6 (same argument).

Actually, the district court rulings, like the Third Circuit's decisions, highlight the limited importance of *Mills* in Pennsylvania. In *four* of these six district court cases, the district courts *denied relief* on the *Mills* claim. *See Lambert* at 118-38; *Williams* at 171-73; *Cross* at 15-18; *Thomas* at 530. In *Cross* and *Thomas*, the claim was *Teague*-barred. In *Lambert* and *Williams*, the district court applied the Third Circuit's decision in *Hackett*, *supra*, and denied relief under the deferential

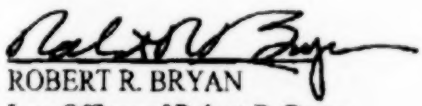
standards of § 2254(d). In the two cases where *Mills* relief was granted, *Morris* at 94-113, and *Rollins* at 37-44, *Morris* was under pre-AEDPA *de novo* review; thus, *Rollins* is the sole case cited by the Commonwealth in which *Mills* relief was granted under AEDPA's § 2254(d).

In short, Mr. Abu-Jamal's meritorious *Mills* claim is a rarity even in Pennsylvania. This Court should not waste its rarely granted certiorari jurisdiction on this case.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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February 13, 2009

AFFIDAVIT OF MAILING PURSUANT TO RULE 29.2

I, Robert R. Bryan, declare under penalty of perjury that I am a member in good standing of the Bar of the United States Supreme Court. My business address is Law Offices of Robert R. Bryan, 2088 Union Street, Suite 4, San Francisco, California 94123. On this date, I deposited in a United States mail box, first class postage pre-paid and properly addressed to the Clerk of this Court, a Brief In Opposition in the above-entitled cause. To the best of my knowledge, the mailing took place on February 13, 2009, within the permitted time.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this the 13th day of February, 2009, at San Francisco, California.

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